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October 29, 1992

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FEDERAL COMMUNICATIONS COMMISSION
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Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

ATTN: The Review Board

RE: Central Florida Educational Foundation, Inc., et. al., MM
Docket No. 92-33

Dear Ms. Searcy:

Transmitted herewith, on behalf of Central Florida Educational Foundation, Inc., is an original and eleven copies of its "Reply Brief" filed in connection with the above-referenced docketed proceeding.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

**MAY & DUNNE, CHARTERED**

By: Joseph E. Dunne III
Joseph E. Dunne III
Attorney for Central Florida
Educational Foundation, Inc.

JED:gmcA41
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xc: All Per Attached Certificate of Service
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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| **In re Applications of** | ) | **MM Docket No. 92-33** |
| | ) | |
| **CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.** | ) | **File No. BPED-881207MA** |
| **Channel 203C3** | ) | |
| **Union Park, Florida** | ) | |
| | ) | |
| **HISPANIC BROADCAST SYSTEM, INC.** | ) | **File No. BPED-891128ME** |
| **Channel 202C3** | ) | |
| **Lake Mary, Florida** | ) | |
| | ) | |
| **For Construction Permit for a New Noncommercial Educational FM Station** | ) | |

**TO:** The Review Board

## REPLY BRIEF

Central Florida Educational Foundation, Inc. (Central Florida), by its undersigned attorney and pursuant to section 1.276 of the Commission's rules and regulations, 47 C.F.R.§1.276 (1992), hereby submits this Reply Brief to the "Exceptions of Hispanic Broadcasting System, Inc." (Hereinafter "Hispanic Exceptions") filed on October 16, 1992. In support of its Reply Brief, Central Florida shows and states as follows.

### I. Hispanic Offered No Relevant Evidence on the 307 (b) Issue Which the Judge Excluded

1. Hispanic's exceptions raise a hue and cry over the Presiding Officer's alleged error in excluding evidence proffered by Hispanic under the 307 (b) issue because, in short, it was not

clear to Hispanic that all evidence submitted under the 307 (b) issue should be submitted in one joint exhibit. Hispanic, it claims, was deprived of its "due process rights in this proceeding" (Hispanic Exceptions, p. 3) because the Presiding Officer did not receive its proffered evidence that Hispanic would provide the first Hispanic owned and operated Spanish language radio station to the Hispanic community. Regardless, however, of whether Hispanic was confused as to the Presiding Officer's ruling, or its clarity, the Presiding Officer did not err because under all circumstances Hispanic did not offer evidence which was relevant under the 307 (b) issue. The Review Board has held that an applicant's proposed program format, even if it proposes to serve an underserved minority, is not relevant under section 307 (b). Suburbanaire, Inc., 104 F.C.C.2d 909. 60 R.R.2d 1325, 1332 (Rev. Bd. 1986). An applicant's purported minority ownership is also not relevant under section 307 (b). Id. at 60 R.R.2d 1333. Nor are Hispanics, or any other racial or ethnic group, a "community" as that term is used in section 307 (b). WHW Enterprises, Inc., 89 F.C.C.2d 799, 810, 51 R.R.2d 409 (Rev. Bd. 1982). Accordingly, for whatever his reasons, the Presiding Officer properly excluded the evidence proffered by Hispanic for the purpose it was proffered.

**II. The Presiding Officer's Award of A Dispositive 307 (b) For Central's Vastly Superior Coverage of Underserved Persons Was Consistent With Commission Precedent and Policy.**

2. Hispanic's Exceptions on this issue ignore both relevant facts and controlling law. At the outset, Hispanic's characterization of Central Florida's programming as "Bible-based" simply ignores the evidence. Central Florida, for example, submitted a complete proposed program schedule which refutes beyond peradventure any characterization that its programming is wholly "Bible-based." Secondly, as of this date Hispanic has not filed an amendment to specify the channel 6 site specified by Central Florida, so Central Florida's coverage advantage, particularly its provision of a second service to 45,000 more persons than Hispanic, is not "illusory," but rather, obvious and compelling. Thirdly, even if Hispanic were to amend to the channel 6 site at this late date the Commission could not, consistent with Commission law, not to mention fundemental fairness, credit Hispanic's coverage from the channel 6 site. Two other applicants amended their applications to propose diplexing using the channel 6 antenna, Bible Broadcasting Network, Inc. (BBN) and Southwest Florida Community Radio, Inc. (Southwest). Both of these applicants amended to the channel 6 site within a short time after the B cut-off date. These amendments were accepted by the Commission in the Hearing

Designation Order, but the HDO specified that these applicants could not gain any comparative credit from the amendment. See, HDO, ¶ 5. In any event, even were the Presiding Officer and the Review Board to ignore the law applied in the HDO, which they may not, e.g., Atlantic Broadcasting Company, 4 F.C.C.2d 943, 8 R.R.2d 599 (Rev. Bd. 1966), they could not ignore existing precedents such as Women's Broadcasting Coalition, 59 R.R.2d 730 (1986) and Sarasota-Charlotte Broadcasting Corp., 6 FCC Rcd 1665, 68 R.R.2d 1705 (1991) which specifically prohibit the award of credit for post-B cut-off improvements to an applicant's engineering proposal. Central Florida has been rewarded here, consistent with Commission precedent, for its diligence in seeking and obtaining a superior site. Likewise, it would be unconscionable to reward Hispanic for its sloth in waiting over two years after the B cut-off to specify a site which one applicant--Central Florida--obtained prior to the B cut-off and two others, BBN and Southwest, obtained within a few months thereafter. This would be particularly unconscionable in view of the fact that Hispanic waited until after the superior coverage conferred by that site resulting in an Initial Decision favorable to another applicant.

## III. Hispanic's Arguments Concerning Central Florida's Alleged "Bible-based" Programming Have No Support In the Record

3. Despite the fact that Hispanic's argument concerning the applicability of section 73.502 to the instant case has no support in any decided noncommercial comparative case, Hispanic's argument concerning Central Florida's "Bible-based" programming suffers from a more fundamental flaw--it has absolutely no support in the record. Unlike Hispanic, Central Florida did submit a detailed and extensive proposed program schedule. That proposed program schedule includes hours of programming that are clearly not "Bible-based, " including hours of local sports, news, public affairs and weather (Central Florida Fdgs. ¶ 24). Central Florida proposes to broadcast instructional programming from Seminole County Public Schools ( Initial Decision, ¶ 8, Central Florida Fdgs. ¶ 17), programming which even Hispanic must concede cannot possibly be characterized as "Bible-based." Central Florida's proposed Spanish-language programming, consisting of a two hour nightly program block, will provide news, public affairs, sports and weather in Spanish, none of which is sectarian or "Bible-based" in nature (Central Florida's Fdgs. ¶ 20). The record shows that Central Florida has adopted eight objectives for the station, only one of which is even vaguely sectarian in nature (Central Florida Fdgs. ¶ 16). The record evidence conclusively shows that Hispanic's arguments have no basis in fact, as they have no support in the law.

4. Hispanic's argument that the Commission's preference for an applicant "which has so limited its programming" is contrary to the First Amendment is also unsupported by law. Hispanic, for example, didn't cite a single case to support its argument. In point of fact, the Commission would be in a difficult position, to say the least, were it to discriminate against an otherwise qualified applicant, with qualified educational programming and an educational purpose, simply because of its religious nature. In Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 69 R.R.2d 420, 423 (Review Bd. 1991), one applicant sought credit for its allegedly more secular orientation than that of Jimmy Swaggart's ministry, and this Board:

> ...decline[d] to become enmeshed in a subjective choice as between its particular orientation and that of JSM. See, generally NBC v. U.S., 319 U.S. 190, 226 ("Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic, or social views, or upon any other capricious basis; cf. Walz v. Tax Commission of the City of New York, 397 U.S. 664, 676-77 (1970) (gov't must show "benevolent neutrality toward churches and religious exercise"); The King's Garden v. FCC, 498 F.2d 51, 60 (D.C. Cir. 1974) ("sectarian tone or perspective" to general run of programming is permissible).

**IV. The Presiding Officer Did Not Err In Refusing To Impose A Share-Time Arrangement**

5. The Presiding Officer's refusal to impose a share-time is fully consistent with the record and Commission precedent. Unlike

the scenario that Hispanic suggests, the Presiding Officer did not reject a share-time solely because the evidence was not included in a joint exhibit, see, Initial Decision, n. 1, and Hispanic Exceptions, page 8, but because the record was singularly bereft of any evidence concerning a share-time other than the fact that some applicants favored it and some did not. There was no evidence in the record submitted to show that a share-time was (or is) in the public interest, that the applicants programming or other goals could be met with a share-time agreement, or even that Hispanic's and Central Florida's Hispanic programming proposals could even be implemented, financially or programmatically, under an imposed share-time regime. Moreover, and most importantly, this case is not the usual noncommercial case where the Judge can find rational distinction between the applicants which have any impact on the public interest, and, since no rational means exist to award the frequency to one applicant, a share-time may be consistent with the public interest. In this case there is ample and irrefutible evidence that Central Florida is to be decisively preferred consistent with the Commission's statutory objectives under section 307 (b). There is no record evidence that a share-time would be in the public interest that would negate the clear and decisive public interest benefits conferred by Central Florida's far superior proposal to provide second service to over 45,000 people.

6. Moreover, absent positive evidence that a share-time is in the public interest, or that the applicants agree or accede to a share-time arrangement, there is little evidence that share-time agreements work in the world in which noncommercial radio stations must survive. Applicants very rarely voluntarily enter into share-time agreements without considerable Commission "encouragement," and very few share-time arrangements actually last for any length of time. Moreover, the Commission's policies and objectives concerning share-time arrangements would seem to conflict. In the Commission's Memorandum Opinion and Order in MM Docket No. 86-406, 3 FCC Rcd 5024, 65 R.R.2d 119 (1988), the Commission stated that: "[w]e have recognized the benefits of centralized operations for noncommercial educational stations, given the limited funding available to these stations..." (waiving the main studio rule). Imposing share-time arrangements on applicants without their agreement will almost certainly result in the creation of redundant facilities, studios, etc., a result which the Commission has repeatedly recognized is a burden noncommercial stations can ill afford to sustain. The additional expense for redundant equipment, the fewer prime time hours with which to solicit for funds or provide sponsors with recognitions, the confusion which split licensees create for the public they both are attempting to serve with the concomitant difficulty in building audience loyalty, would

tax a radio service much more robust than the Commission recognizes is the case with noncommercial educational stations. These factors render the purported public interest benefits of an imposed share-time illusory at best, and certainly are not clear enough to impose a share-time when compared with the clear and decisive advantage grounded in the Commission's traditional statutory objectives offered by Central Florida's proposal to provide second service to more than 45,000 people.

## V. The Presiding Officer Did Not Err In Failing to Grant Hispanic's Petition To Enlarge Because It Was Grossly Untimely And Not Supported By Convincing Proof

7. At the outset, CFEF notes that Hispanic's Petition was evaluated pursuant a higher standard because it was grossly untimely. Section 1.229 (b) of the Commission's Rules provides, in pertinent part, that petitions to enlarge must be filed within 30 days of the publication of the Hearing Designation Order in the Federal Register, or 15 days after the facts giving rise to the petition are discovered. Hispanic represented that the evidence which supported its Petition was not discovered until it received a letter from Mr. Diehl, the Chief Engineer for First Media Corporation, the licensee of WCPX-TV, channel 6, Orlando ( Hereinafter "WCPX") dated July 10, 1992. The gist of Mr. Diehl's letter, however, that there was no room on the WCPX tower for other

antennas, is precisely the same information as was conveyed to Bible Broadcasting Network (BBN) in a letter dated February 17, 1989, to Hispanic itself in a letter dated June 29, 1989, and to Southwest Florida Community Radio, Inc. in a letter dated November 13, 1989. The fact that WCPX represented that it had no room on its tower was therefore known to Hispanic for over three years. The facts upon which Hispanic relies, therefore, have either been public knowledge, viz., that Central Florida specified the channel 6 site in its original application, or known to Hispanic, i.e., that channel 6 was denying other applicants permission to use the tower because of lack of room, for over three years. It is not a mischaracterization to label evidence as "grossly untimely" which Hispanic submits post-hearing which it has had in its files for over three years. See, e.g., Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 69 R.R.2d 946 (1991)

8. Section 1.229(c) of the rules permits the grant of an untimely filed petition to enlarge "only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." Id. at 947. This standard requires the proponent "...to establish the likelihood of proving the respective allegations therein is so substantial as to outweigh the public

interest benefits inherent in the orderly and fair administration of the Commission's business."(emphasis supplied) The Edgefield-Saluda Radio Co., 5 F.C.C. 2d 148, 148-49 (Rev. Bd. 1966). See also, Great Lakes Broadcasting, Inc., supra, 69 R.R.2d at 947, n. 6. Hispanic totally failed to shoulder this burden. The facts upon which it relies, three letters which refuse other applicants permission to use the tower, does not prove that the site was not suitable for Central Florida when it sought permission to use the Channel 6 tower, or that either Channel 6 or Central Florida knew the site to be unsuitable when permission to use the site was granted to Central Florida. Hispanic has not proffered one shred of evidence from a person with personal knowledge of the facts which establishes either that the site was unsuitable when permission was originally granted or that anyone knew of the site's unsuitability when permission was first granted. Proving "the likelihood" of those facts was and is Hispanic's burden. In this instance we have an over three year delay from the time the facts in question occurred, an over three year delay from the time the facts relied upon became known to the proponent, and evidence which, at best, is ambiguous, and can in no way can be characterized as compelling or persuasive. The Presiding Officer properly ruled in the interests of "...the orderly and fair administration of the Commission's business..." Id., in finding that Hispanic had not shouldered the

heavy evidentiary and persuasive burden required by the Commission's rule for the grant of an untimely petition to enlarge.

**WHEREFORE, THE FOREGOING PREMISES CONSIDERED**, Central Florida Educational Foundation, Inc., hereby respectfully urges that the Initial Decision of Edward J. Kuhlmann be expeditiously affirmed.

Respectfully submitted,

**CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.**

By: Joseph E. Dunne III
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**CERTIFICATE OF SERVICE**

I, Glinda Corbin, a paralegal in the law offices of May & Dunne, Chartered, hereby certify that I have caused to be sent this 29th day of October 1992, via first class U.S. mail, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF to the following:

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